

## PRAISE FOR *THEATER FOR TRIAL*

“There’s direct, practical, and plain-spoken advice on every page. It’s guaranteed to make the reader a better trial lawyer.”

—Rick Friedman, coauthor of *Rules of the Road*,  
past president of the Inner Circle of Advocates

“Joshua Karton: guru, dancer with words, father of trial lawyers for the people, he teaches us how to discover our perfect selves and to thereby make that precious gift to others.”

—Gerry Spence

“*Theater for Trial* is a unique book from a dream team of courtroom experts, David Ball and Joshua Karton. Every page is a useful collection of the wisdom they acquired from decades as top-rated theater and screen experts, combined with decades in the trenches of trial advocacy. Few advocacy books are this good, except David’s others.”

—Gary Johnson, obtained largest verdict in the  
state of Kentucky, \$270 million; creator of the  
concept of Judo Law in the courtroom

“An indispensable and vital reference work by legends in the field of communicating with jurors, to be read and reread by all trial lawyers who want to excel. Chock full of practical advice and useful techniques with specific examples of Dos, Don’ts, and their Whys.”

—Bob Genis, winner of twenty-six multimillion-dollar  
verdicts and five eight-figure verdicts, listed in  
*Super Lawyers* (NY) and the NY Plaintiffs Hall of Fame

“Since its first publication in 1994, David’s original *Theater Tips and Strategies for Jury Trials* has remained one of my favorite—and most significant—trial advocacy books in my library, so it honestly was hard to imagine how it could be made any better. But, by bringing in the incomparable Joshua Karton to help him update and revise the content, the book will be staying on the very top shelf of my library.

“When Joshua addresses *motives* for parties’ actions from the start, you know right away that this new edition continues the difference from

the ‘rest of the herd’ of the original. He heads straight to the heart of storytelling where most others keep nibbling around the edges. Then, David effortlessly picks up that thread when discussing the virtues—and dangers—of legal storytelling.

“A common theme throughout the book is the attorney habit of just *telling* decision-makers how to think or what to feel. Instead, David and Josh lead you through how to ‘artfully’ invite jurors to create their own version of a persuasive case story. As these authors say, ‘Why tell them when they can tell you?’

“They go on to acknowledge and offer ways to overcome the many potential limitations that confront attorneys who, by default, are not only their own ‘scriptwriter,’ but must serve as their own actor and director as well. At least, until they have read this book and can bring two hugely talented and finely tuned theatrical minds to the ‘team.’

“And throughout the book, there are many times when the dialogue has been recorded between Joshua and David as they explore and work through a problem of persuasion, and we get to be in on that conversation through the thoughtfully provided transcripts.

“You really can’t beat that.”

—Eric Oliver, trial consultant of over twenty years’ experience,  
author of *Facts Can’t Speak for Themselves*, coauthor of  
*Courtroom Power: Communication Strategies for Trial Lawyers*

“I owe much of my success as a lawyer to David Ball and Josh Karton. This book shows why, including ways to connect with the jury, how to prepare yourself and your client for trial, and how to present the facts in your case. This is a must-have for every plaintiffs’ trial lawyer.”

—Michael Leizerman, first chair AAJ Trucking Litigation Group,  
author of West’s *Litigating Truck Accident Cases* and Trial  
Guide’s upcoming *The Zen Lawyer: Winning with Mindfulness*

“Outstanding advice from outstanding communication experts. Here in one volume, you get counsel from the nation’s best-known teachers of communication and trial.”

—Paul Luvera, past president of the Inner Circle of Advocates  
and the Washington State Trial Lawyers Association

“This book is a game changer for trial lawyers. Readers not only learn the theater-based strategies that will help them motivate and persuade

juries, but also are given specific training methods to develop their individual advocacy skills. It's a must-read for young trial lawyers, law students, and even the most experienced lawyers looking to take their trial skills to the next level."

—Susan Poehls, director of trial advocacy at Loyola Law School in Los Angeles, recipient of the Lifetime Achievement Award for excellence in teaching from Stetson University College of Law's Educating Advocates Conference

"Great trial lawyers from all over the nation routinely travel thousands of miles to consult with David Ball and Joshua Karton on trial strategy and communication skills because David and Joshua are the best at what they do. In *Theater for Trial*, David and Joshua unselfishly share their collective experience and insight to help trial lawyers make the most of each precious moment with the jury. Read it and you will improve as a trial lawyer. Master the lessons David Ball and Joshua Karton share and you will be unbeatable in the courtroom."

—Rob Ammons, founder of the Ammons Law Firm,  
editor of *Tire Defect Litigation*

"I am privileged to have worked with David as my trial consultant on several cases where our trial team received multimillion-dollar jury verdicts. For all of us who get in the arena and try cases, *Theater for Trial* is a MUST read. This book provides practical guidance on how to use theater techniques to assist in telling your client's story in the most compelling and captivating way. I love the way the book teaches practical techniques that we can easily implement daily to assist us in becoming better communicators. I have started implementing many of the techniques taught in the book and can already see an improvement in my ability to communicate more effectively. I have no doubt in my mind that implementing and practicing the techniques taught in the book will make us all better trial lawyers!"

—Darryl Lewis, named in *Best Lawyers in America*, recognized in *Florida Trends* as one of the "legal elite," and named by the *South Florida Legal Guide* as one of Florida's top lawyers

"Think Reptile meets Sir Laurence Olivier. It's a recipe to humanize lawyering with a pinch of 'reptile' and a sprinkling of 'damages.' This book rounds out your education and insight as to what it means to be a lawyer and be human . . . a perfect storm of all the tools it takes to

make a total and great lawyer. Great tips on witness prep, jury selection, and advocacy. This book is a compilation of all the things you never learned in law school (but need to in order to grow as a lawyer). It's required reading no matter what stage of your law career you are at. Reading this book is like listening at the table of two masters sharing their best-kept secrets."

—Lisa Blue, past president of the AAJ, has earned over \$350 million in verdicts for injured clients; author of *Jury Selection: Strategy and Science*, *Blue's Guide to Jury Selection*, *Preparing for Voir Dire*, and *Conducting Voir Dire*

"This is a very helpful book. We forget that 'people in any particular demographic group are not all similar.' There are some very valuable lessons here. For example, as the book bluntly points out, 'fairness questions are pointless.' I found it very helpful to learn to ask about the folks who make up the norms in the 'research' dealing with jury studies. I'd never gone that extra step, which means I've been the victim of some very bad data. Finally, the 'identifying leaders' section was very practical. I recommend this book."

—Dorothy Clay Sims, author of *Exposing Deceptive Defense Doctors*

"With *Damages* and *Reptile*, Ball revolutionized trial strategy in personal injury cases. In *Theater for Trial*, he, along with the brilliant Joshua Karton, takes on the other critical piece of winning a case—how to connect with a jury. Without that connection, even the most cutting-edge arguments will fail. If plaintiffs' lawyers want to be truly effective at trial, they need to have this book in their arsenal."

—Bryan Slaughter, president-elect of the Virginia Trial Lawyers Association, faculty member of the National Trial Advocacy College

"When two great minds get together magic happens, and that is definitely the case in *Theater for Trial* by David Ball and Joshua Karton. Both of these authors have made an incredible impact on the ability of lawyers to persuade juries through the power of narrative, and their combined efforts are a treat for the senses. Regardless of your level of experience, there is something in their work that will make your heart sing, and juries weep."

—Charlie H. Rose, director of the Center for Excellence in Advocacy, Stetson University College of Law

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# THEATER FOR TRIAL

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INCORPORATING THE FOURTH EDITION OF  
*THEATER TIPS AND STRATEGIES FOR JURY TRIALS*

DAVID BALL

JOSHUA KARTON



TRIAL GUIDES, LLC

Trial Guides, LLC, Portland, Oregon 97210

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*For Artemis Malekpour, my consulting partner, who is the best and brightest. She works at the cutting edge of jury persuasion methods without losing sight of the fundamentals we cannot do without.*

*Inspired by the likes of the University of North Carolina's legendary Dean Smith who won the hardest games, and by UNC's alum Michael Jordan who did the same, Artemis saves and wins more hard cases than any one lawyer or consultant (she's both) that I know. She improves me and what I do, and I'm grateful for her practical brilliance and for her carrying on and enhancing my own contributions. We all hope for some Dean Smith and Michael Jordan in our work.*

*For me, that's Artemis.*

*Thank you, Artemis.*

—David Ball

*For Mitchell, my brother, the most cherished friend whose care and kindness, and whose gifts of wit and wisdom, are always on call without reservation or limit.*

—Joshua Karton

**ALSO BY DAVID BALL**

**BOOKS**

*David Ball on Criminal Defense*, reptilekeenanball.com, 2016

*Reptile in the Mist (and Beyond): The Plaintiff's Attorney's Guide to the MIST-case Revolution*, reptilekeenanball.com, 2013

*David Ball on Damages*, 3rd ed., Trial Guides, 2011

*Swamp Outlaw*, Aberdeen Press, 2010

*Reptile: The 2009 Manual of the Plaintiff's Revolution*, reptilekeenanball.com, 2009

*How to Do Your Own Focus Groups: A Guide for Trial Attorneys*, National Institute for Trial Advocacy, 2001

*Backwards and Forwards: A Technical Manual for Reading Plays*, Southern Illinois University Press, 1987

*Guthrie New Theater*, Grove Press, 1976, with Eugene Lyon

**DVDS**

*The Ball Method of Opening Statements*, reptilekeenanball.com, 2014

*Focus Groups: How to Do Your Own Jury Research*, Trial Guides, 2010, with Debra Miller and Artemis Malekpour

**ALSO BY JOSHUA KARTON**

**BOOKS**

*Film Scenes for Actors*, volume 1, Bantam Doubleday Dell, 1983

*Film Scenes for Actors*, volume 2, Bantam Doubleday Dell, 1987



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## AUTHOR'S NOTE FROM DAVID BALL

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To avoid duplication of what I've written elsewhere, this book will frequently refer you to any one of several others to explain certain important principles. So to best profit from this book, please have the following ready to refer to:

David Ball, *David Ball on Damages*, 3rd ed., Portland, OR: Trial Guides, 2011.

David Ball and Don Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution*, reptilekeenanball.com, 2009.

David Ball and Don Keenan, *Reptile in the Mist (and Beyond): The Plaintiff's Attorney's Guide to the MIST-case Revolution*, reptilekeenanball.com, 2013.

If you already own an earlier edition of *Theater Tips and Strategies for Jury Trials*, you'll want to keep it. It contains information we have no room for in this edition—but it's still useful information.

# TYPOGRAPHY NOTE

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While we wrote this book in tandem, our points of view on the worlds of law and theater are sometimes different, and our approaches are different. To help you keep track of who is speaking, our sections are divided up with different type.

This typeface is for David's sections.

This typeface is for Joshua's sections.

In addition, there are headings in the margins to indicate who is writing.

## PUBLISHER'S NOTE

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This book is intended for practicing attorneys. It does not offer legal advice or take the place of consultation with an attorney who has appropriate expertise and experience.

Attorneys are strongly cautioned to evaluate information, ideas, and opinions set forth in this book in light of their own research, experience, and judgment. Readers should also consult applicable rules, regulations, procedures, cases, and statutes (including those issued after the publication date of this book), and make independent decisions about whether and how to apply such information, ideas, and opinions for particular cases.

Quotations from cases, pleadings, discovery, and other sources are for illustrative purposes only and may not be suitable for use in litigation in any particular case.

All individual and business names that appear in illustrative examples have been fictionalized, and any resemblance between these fictional names and real persons is strictly coincidental and unintentional. Real names are used only in reported cases for which citations are given in the footnotes. The publisher disclaims any liability or responsibility for loss or damages resulting from the use of this book or the information, ideas, and opinions contained in this book.



# FOREWORD TO THE FOURTH EDITION

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## DON BESKIND

Imagine the scene at Hillcrest Country Club in Los Angeles when a group of legendary comedians gather every Friday at a round table for lunch. The “Roundtable” includes Groucho Marx, Jack Benny, George Burns, Milton Berle, and Don Rickles. They socialize, try new material out on their friends, and talk “shop.” “Young” comedians like Chevy Chase and David Steinberg covet a lunch invitation for the opportunity to learn at their feet. What wisdom they offer!

Over the course of my career as a trial lawyer, I have had the great luck to be a frequent guest at the Roundtable of two great consultants, David Ball and Joshua Karton. I taught with them at seminars, and both have consulted on my cases. What wisdom I received! I always wished every trial lawyer could share that experience—and now you can.

In this volume, David and Joshua share their combined insights borne of working on hundreds if not thousands of cases and with hundreds if not thousands of lawyers and witnesses. They share concepts, ideas, and thoughts that can change how you think about a trial and how you try a case. All that is wonderful. But other books can do that, though perhaps not as well. Unique to this book is that for the first time Joshua shares and David adds exercises that can change the way you feel about trying a case and how jurors feel about you.

If you have ever felt you were not connecting with jurors, you probably were right. But you may have been wrong when you thought the problem was your message. Joshua and David focus on the real problem—you—the messenger. Their exercises teach you how to connect with jurors and gain the confidence that comes

from making that connection. These exercises come from theater and acting and, at least for me, were a personal stretch at first. Joshua had me doing things that seemed odd and uncomfortable—out of my comfort zone. You may feel the same. Don't let that stop you. Stay with the exercises and you will be rewarded with a deeper understanding of your jurors and yourself. Let me say that again: When you come to an exercise, don't just read about it or think about it. Do it. You will be richly rewarded for your efforts.

And the exercises are not just for you. There are exercises for your clients and other witnesses. I had a case where my client had devastating injuries but was an unlikeable witness, alternating between self-pity and arrogance. The self-pity was a response to his losses; the arrogance predated his injury. In one amazing session, I watched Joshua prepare the witness for his deposition. Joshua put the man in touch with how he was coming across to others and helped him reach the conclusion that he had to change that perception to achieve his goal of getting compensated for his losses. After his prep session, the client gave a deposition that made everyone in the room cry—and made the case settle for considerably more than we thought possible before the deposition.

David Ball's work—and results—speak for themselves. Add Joshua Karton's perceptive thoughts about trials and exercises, and you have this book. Knights at the Roundtable sharing great wisdom. Read it, enjoy it, and go forth and conquer.



# ACKNOWLEDGEMENTS

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## DAVID BALL

Thanks to my years of theater students whose current careers make me proud. Thanks to Susan Chapek Pochapsky, whose writing and performance work keeps me in mind of how good theater can be. Thanks to the two master directors I've been lucky enough to work with at length—the late and dear genius Michael Langham and the very much living genius Dominic Serrand; they showed me the way. Thanks to my long-time trial consulting partner, Artemis Malekpour, who teaches me something important every day. And thanks as always to my own personal “Dons”—Keenan and Beskind, two advocacy masters and master teachers who are always there for me.

## JOSHUA KARTON

There are so many people to acknowledge, without whose guidance, inspiration, and example this work would not have been possible. (The orchestra at the Academy Awards is already starting to play me off.) So, in the limited space here, I want to specifically acknowledge the people who invited me to help the trial lawyer, to teach communication for the courtroom advocate, for that has been the honor and adventure I never knew to imagine for myself. It began with Katherine James and Alan Blumenfeld, who invited me to join them in sharing the tool chest of the actor, director, and playwright with attorneys. For over twenty years, the extraordinary and iconic Gerry Spence has offered me a laboratory to develop and nourish the heart and craft

of trial lawyers truly seeking justice for people, not for protecting power. Jeff Horwitz, who first brought me into the JAG Corps, and Janeen Kerper, Charlie Rose, and Susan Poehls who made a place for me in law schools. And David Ball, whose audacity of intelligence has changed the plaintiff practice, and whose kindness and respect let me be a part of this book.

Thank you, of course, to the team at Trial Guides who were called upon to find solutions quite out of the ordinary to bring this book to print: Managing Editor Tina Ricks, Production Editor Travis Kremer, Interior Designer Laura Lind, Cover Designer Michael Fofrich, Copyeditor Gayle Francis Moffet, Indexer Lucie Haskins, Proofreader Patricia Esposito, Legal Reviewer Jonathan Kirch, and Publisher Aaron DeShaw. There is another roster of Trial Guides personnel who I am told will be responsible for the book actually getting to you, and I want to thank them in advance: Cindy Ward, Michael Lippold, Melanie Becic, Bob Patrick, Adam Boettiger, and Lisa Carper.

# INTRODUCTION

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## DAVID BALL

Athena, Greek Goddess of Justice, announced this about the underground snake-headed revenge-goddesses called the Furies—right after they eschewed revenge and agreed to become the first jury:

With terrifying faces calmed,  
They bring us home to safety.  
Worship them forever. They are our justice.

—Aeschylus, *The Oresteia*, Part 3

Playwright, director, and carpenter Peter Quince’s slightly paraphrased words when he finds a good place to direct the play he has written:

. . . a marvelous convenient place  
for our rehearsal! This green plot shall be our  
[courtroom], this hawthorn-brake our [jury-room],  
and we will do it in action as we will do it before the [jury].

—Shakespeare, *A Midsummer Night’s Dream*

## THE BIRTH OF TWINS

Theater and juries were born together in the same crib, for the same purpose, and birthed by the same people, in the sixth century BC Athens. The purpose was to persuade both audiences and jurors, and both theater and jury used the same techniques to do both. In fact, Aeschylus’s *The Oresteia*, the first great play in Western literature, is about the invention of the jury. Playwright Aeschylus took sides—the “yes” side—in the roiling civic debate over whether to remove punishment for crimes and torts from the hands of wronged victims and their families. Aeschylus wanted

**DAVID  
BALL**

to let the community decide guilt, retribution, punishment, and justice—by means of jurors. *The Oresteia* tells of revenge killings and re-revenge killings that had been bloodily careening among multiple families as far back as Greek mythology went—back to the gods themselves. In *The Oresteia's* climax, Athena ends these rebounding blood revenges by persuading the underground goddesses of retribution—aptly called the Furies—to stop fomenting private revenge and instead serve as the first Athenian jury. No longer would communities and nations and cities be devastated by ravages of blood revenges. Henceforth juries would determine justice. So a crime against a person became and remains a crime against the state. The jury decides; punishes or not, as appropriate; and that's the end of it.

For centuries, the twins of theater and trials used all of each other's persuasive methods. They even used the same buildings. But starting in the late nineteenth century, theater was tossed out of court, stripping trial advocacy of its precious theater birthright. The result has been too many endless, bloodless, boring trials—uninspiring, unconvincing, unattached to their juror-audiences. Even theater's force of truth has been largely left behind. In its place, jurors are handed facts from the equivalent of file-folders instead of human beings. The pursuit of justice has been thinned from a primal struggle to a dry whisper. The system assumes jurors to have no feelings, a 100 percent perfect memory, and the ability to give a damn about boring men and women talking away in front of them. In the end, the poor jurors throw a verdict at the system and rush home, free at last. So the once life-giving force of delivering justice and safety has dwindled away. Walk into any jury trial at any random moment and the chances are high that the jurors are mentally elsewhere. Even jurors who seem to be listening are mostly day-dreaming. Theater's methods of showing truth, creating involvement, motivating juror action, and giving trials a life-giving force have all but disappeared. Jury service is now jury punishment.

And justice is poorly served, because without the force of theater methods, jurors ignore most of the law and much of the evidence.

Yet theater methods remain at the heart of our most popular and riveting plays, TV shows, movies, and novels. Lawyers think

they cannot achieve this level of jury involvement because, after all, trials are real and movies are not. But that's not the reason. Lawyers can't achieve that level of involvement because they were never taught the near-endless storehouse of methods and strategies that theater and screen still use today, all of it based on 2,500 years of focus group research called "shows," the best kind of audience research ever discovered.

Some genius lawyers instinctively do better. But for those who are not the Michael Jordans of the courtroom, theater methods are here for the picking, alive and better than ever in theater and on screen. They're as close as your living room TV, local movie house, or live theater stage. You need only some guidance on how to bring them into trial without crossing procedural, decorum, or appropriateness lines.

Hence this book.

The methods in this book are not improper, deceptive, or inappropriate. They are not "theatrical" in the sense of showy or fake. Or over the top. They are effective, subtle, mostly transparent ways to communicate yourself and your case to jurors and judges.

## MOTIVATION

Here is one example, important enough to put up front: In most trials, especially civil, lawyers ignore the concept of **motivation**. This is true despite twentieth century psychologists thinking they discovered it, which of course theater has been using since the fifth century BC. So trial advocates have been missing what's been going on openly, loud and clear, and right in front of their faces at every play or movie they ever see. Yet motivation, the prince of acting, script writing, and directing, is—or will be when you learn it—the crown prince of courtroom persuasion.

Applying motivation is simple: when you want jurors to believe that someone did what you say she did, simply show what motivated her to do it:

- a) what did she *want* that she was
- b) *trying to get* by means of doing what
- c) you want the jury to believe she did?

DAVID  
BALL

For example, you want jurors to believe that the radiologist read the X-ray too fast. So suggest possible motivations:

- a) What had the radiologist *wanted* that she was
- b) *trying to get by*
- c) reading the X-rays too fast?

Perhaps she

- a) *wanted* to be on time for her daughter's birthday party so
- b) to try *getting there* on time she
- c) read the X-rays too fast.

Or maybe she

- a) *wanted* to finish all her X-ray reading that day but she had too many, so she was
- b) *trying* to finish them all by
- c) reading too many in the time she had.

Or maybe she got paid by the X-ray, so she

- a) *wanted* money so
- b) she *tried to get it by*
- c) reading as fast as she could.

Don't try to prove any of these possible motivations to be true. The jurors will each adopt the one they believe, so they'll easily believe what you say she did: read too fast. Jurors may not even believe a motivation you suggest, but your suggestions will thrust them into a motivation-seeking mode. They'll invent motivations on their own to explain why a radiologist would read too fast. Tired. Didn't give a damn. Whatever.

Motivation is essential for every actor. Any action an actor shows without knowing its motivation will seem fake to the audience. In trial, opposing counsel can easily make jurors disbelieve

what you claim the person did—such as read the X-rays too fast—unless you suggest motivation. When you go see your kid in his school play, the acting might be charming but you rarely believe it. Kids rarely know about motivation. So all they do is stiff, awkward, *unreal*—and thus ultimately uninteresting unless it's your own darling child. Maybe.

The same happens when trial advocacy ignores motivation—which it almost always does because advocacy teachers don't know much about it or how to use it any more than they know any of the myriad other methods of theater for conveying truth. Without those methods, counsel is not doing what's needed to be engrossing, credible, worth following. So she's not getting very far into the jurors' eyes and ears, much less brains. In theater that's a sure route to a flop.

So it is with trials.

## TRUTH

You don't need to master or even learn about every theater method. In fact, there are far more than we can encompass in this book. But this book shows you more than enough to revive your birthright as a trial advocate: access to the most highly developed, well-tested, experience-proven, and powerful methods of persuasion and conveyance of truth ever invented.

This book is not about theater's illusion or glitz methods. It's about the truth. A good production of *Hamlet* can change not merely your mood but your life. So we select from the methods of a good production of *Hamlet*. Not from the make-believe parts, but from the inner truth parts: truth not only in content, but in performance and presentation. By seeking out these methods of inner truths and how to use them in trial, you depart the hallowed halls of law school and arrive full-armed into the unhallowed, charismatic world of theater whose forces were born to do the truth job.

This book is the distillation of two seasoned theater and screen professionals with nearly a century between them of intensive trial experience. We're taking you across our bridge.

DAVID  
BALL**WHY A NEW EDITION OF *THEATER TIPS AND STRATEGIES FOR JURY TRIALS*?**

I never publish new editions unless I have a whole lot to say that is new. And while I have a lot to say that is new, even more important is the addition of Joshua Karton. He's the most gifted trial skills and truth teacher alive. For two decades I've been trying to get Joshua to write about the magnificent concepts he trains lawyers to master. But for Joshua, putting words to paper—like all else he does—is a task of intense dedication and love. In my theater years, the few geniuses I was lucky enough to work with made me wiser with every project. Joshua is one of them.

I hope what I have to say in this edition will help you as much. I teach you many of the methods I taught my generations of theater students who went on to standout careers in theater, film, and TV. I learned and developed the methods over the course of writing plays and movies, and directing dozens of shows—though I've spared the world the abomination of my acting.<sup>1</sup> I've used my experience in hundreds of trials and trial preparations. On that basis I, like Joshua, have been able to cherry-pick methods for you from the vast orchard of theater and screen methods.

**THE GREATEST LESSON**

After you do all the great and necessary work on yourself to master this book's methods, trial—ironically—is still never about you. It is all and always about jurors. The only question at trial is how and what your jurors perceive of you and all you do and put on. This requires an ability on your part to forget about yourself despite all the work you did, and instead focus it all on your audience. Your jurors are the masters of your client's fate, just as they are the masters of the fate of every play ever staged, every movie ever screened.

Ignore those masters at your peril.

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<sup>1</sup>You can, however, see my cameo appearance in the international cult classic *Hard Rock Zombies*, to which I graciously lent my thespianic talents because I had written the horrid thing. The film made a ton of money and as far as I can remember was my swan song as an actor. Thank God and applaud.



**AND OH HOW MUCH WE NEED YOU NOW!**DAVID  
BALL

With the current condition of the nation, the importance of trial lawyers to our safety has skyrocketed. We need you as persuasive in trial as you can get yourself to be. Your hard work to master this book's methods will help you get there. So please do the work. We need "Curtain up," not "Curtains!" And trial lawyers—you!—are now one of our last bastions against curtains.

**JOSHUA KARTON**JOSHUA  
KARTON

*When we speak from the heart, your body agrees with you.*

—Linda Alinda-Ikanza

Until now, when asked to write about the work I have done with lawyers and witnesses, I have said no. The work has evolved to assist in solving the challenge of communication in the live circumstances of deposition or the courtroom. There have been exercises, some carefully devised, some discovered on the spot, but all take place in real time, like the live communication they seek to unbind. I struggled with how I could accurately render in printed language on a page a live process which unfolds in real time and space. I'd written an article given to workshop participants entitled "On Paper vs. In Person," but only as a companion review of a live training experience, never as a substitute for the experience.

Although the methods for releasing personally authentic behavior out from under the defensive masks and shackles of stage fright or restrictive legal procedures are anything but haphazard, they find their way as water finds its path, adjusting to the moment-by-moment obstacles, adapting spontaneously. Each person is different, so the blockages appear in different places. One can diagram how to tie a knot, but not predict how

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long it will take to untie it. Trying to untie that knot too quickly, indifferent to its individual points of stress, only makes the knot tighter.

But David Ball asked me. Need I say more?

Late in the process of preparing these pages, David and I had a conversation in which I told him about a session I'd had with a young lawyer that moved me deeply, because it confirmed a profoundly reassuring truth: If the attorney is speaking from the right place inside himself, wired-up correctly, much of the concern of what to say, of which words to use, takes care of itself. Worries over gesture, tone of voice, sequencing narrative . . . all of these are often solved by a single inner clarifying of "who am I truly talking about?" or "why does this actually matter to me?" I told David the story of what had happened, and he said, "You *have* to include this in the book!"

His encouragement touched on what has been my other principal hesitation in writing about this work: How could I do so without violating the privacy of those with whom I've done it? Without naming names? And even if the names are changed, the lawyers' clients are assured that because I come to them with their lawyer present, their confidentiality is secure.

When people have said, "From what you do you must have extraordinary stories; you are such a storyteller; you must write about what you do," I have always felt these stories are not mine to tell. They belong to the people to whom they happened, the people with whom I have been privileged to work. What I can try to tell here are some ways in which lawyers and witnesses have been helped in telling their stories, so that jurors are moved to take an action to right a wrong. In the examples described in the following pages, the people with whom I have worked are not named, or identified by where they live, or by any other identifying characteristics. Some are composites based on more than one

person. Where people *are* named, it is to attribute a teaching or source to a particular professional.

Except for this one, the story of my experience with Romy, and it is because she has granted her permission for me to share it that I do so here.

## ROMY'S STORY

Romy is a new, young public defender. She finds herself battling daily in courtrooms against judges and opposing counsel. The camaraderie of her office can be a shield against this, but it's also an invitation to early-onset cynicism. The public defender system in her county suffers from all the administrative potholes plaguing any government bureaucracy, which is why she has found herself one morning, having received no advance announcement or warning, sitting in a room with me and a dozen of her colleagues. She had only just arrived at the office to be informed that they will be spending their day with someone named Joshua Karton, with no idea who that is, or what they are going to be doing with him.

I try to introduce myself quickly enough to not waste their time, but sprinkling enough detail for them to begin to have a hunch as to how I might be of service to them. This is a balancing act, because they sit with the growing awareness that instead of being bored listening to this strange man, they are actually going to have to get up in front of each other and deliver an excerpt from one of their own cases . . . Which is more nerve-wracking? Continuing Legal Education (CLE) is usually conducted from a lectern, with the participants seated behind long tables, facing talking heads or PowerPoint screens, taking notes between the covert checking of e-mail and texting. Romy and her colleagues are instead sitting in chairs in a circle, and it is just . . . *weird*. Even name dropping credentials both impressive and relevant to their world do not immediately motivate them to stand up and risk

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delivering a brief excerpt of the live communication which they will have to present in a courtroom. I need, *swiftly*, to provide *something* that warrants their faith that this time will be useful to them professionally, but with enough self-revelation, vulnerability, and anecdote that the room becomes a safe place for their taking risks in personal expression. Quite like beginning a *voir dire*.

I let them know how my journey to this room began: I was working in a theater company with a very adventuresome education department, and folks in all kinds of professions who had communication obligations but no communication training came seeking help, one of whom was . . . a trial lawyer. I speak of how, as a writer, and actor, and director, I discovered I understood something about the unique fulcrum of communication on which the trial lawyer teeters—you are trained in law school as writers, but the event of the courtroom is not a literary one. In some moments, not even a verbal one. It is a live, human event, parsed in pulse and breath. Sometimes honoring what you've written does not satisfy the live, moment-to-moment exigencies in which these jurors, in this present tense of this courtroom, right now find themselves. I explain that I began attending trials, and saw how often communication blockages could be solved, simply, through the actor or director's awareness and know-how.

I ask, "So, if you had a screenwriter, or a playwright, or an actor, or a director whose work you knew and respected sitting here with you, what would you ask them if *maybe* they had an idea of how to help with something? For example, 'I don't know if you would know anything about how to solve this, but every time I start talking in court, my mouth is so dry and my voice is so shaky. Do you know anything about stage fright?'" (I confess to them that I am an actor who vomits. This lowers the bar for self-disclosure. I assure those next to me I am done for the day.) Or, 'I hate my client. I started out loving him, but he actually is an

asshole. I mean, I can't show how I really feel to the jurors. So, I want to develop a poker face. Can you teach me how to do that?"

(No, I will not teach you how to hide what is really going on inside you, but I *can* teach you how to redirect what you *are* feeling to a useful direction. But more on that later.)

We make a list of everything from over-reliance on notes, to difficult judges, to handling boring or pompous experts, to not turning into a lawyer robot, to how to stop fiddling with your pen, to reading jurors' body language, to . . . any and all of it.

I ask everyone to choose an opening, preferably one in current preparation, as opposed to one they've already done. "Something you are working on now is best, so there will be some heat under what you choose, rather than it being retrieved from your personal archive of either 'My Greatest Hits' or 'The Ones That Got Away.' Romy is the first person to get up in front of the group. She immediately issues a disclaimer, apologizing that "this is a really boring case." Now, I know that there is no such thing as a boring case if the human story is located within it. What I don't know is if Romy knows this and is saying this simply to protect herself from stage fright or potential failure by deprecating the case. Or, has the poison through which she must travel every day in the criminal justice system already infected her with its disrespect of her client? The answer to this question will determine through which door we enter.

There is another matter. One of the aspects which trial work shares with the actor's world as distinct from the writer's is that the lawyer is physically present. You will be looked at. Your voice will be heard. The case is not delivered by a legal pad or a printed document. Considerations of physical appearance and characteristics are not inappropriate; in fact, the reverse. Romy is quite lovely. She does not seem to be aware of this, or trading upon it, which makes her all the lovelier. Her skin is a pale, glowing

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mahogany. She is from Haiti. When asked what she wants particularly to work on, she reveals that she is quite self-conscious about her accent. This is the first big surprise, because I cannot detect any accent. I am trained in dialects—I certainly understand that French is her first language—and I still cannot detect any accent. I strain to hear even an Audrey Hepburn-esque unique particularity of speech (called an idiolect or idiolact), even if not an identifiable accent. Maaaaybe, but if so, barely. I canvass the group; does anyone else hear an accent? No one else hears one either, except for one person: her best female pal in the group, who is African American. There is a lot going on here, but I cannot yet tell what.

Romy begins her opening. There is a man in Walmart. Something about his having perhaps PTSD from having served in either Iraq or Afghanistan. Something about it being just a normal day, a day like any other. He is just looking around, not doing anything. He decides to leave. He gets to the first set of glass exit doors and Security stops him. They inform him they have video footage on him from previous visits. They apprehend him.

We start with her self-consciousness about her accent, her non-accent. It is the common concern of anyone for whom English is not the first language. But the struggle to communicate in a second language is common to all courtroom lawyers, even native English speakers, because *all* have had to demonstrate proficiency in Legalese in order to be admitted onto the field, and this Legalese is *no one's* native tongue. Students are trained in law school how to speak in this code, and the more proficient they are, the more the law school professors can feel secure that students have learned what professors are responsible to teach. But Legalese is not a language jurors speak, and jurors are not automatically grateful to be in the presence of those who do. At the very least, they do not

understand it. At worst, it separates the advocate from the very people with whom the advocate needs to connect.

I ask Romy to tell us a story about her life, something personal, in French.

“In French?”

Oui.

There is the usual back-and-forth stalling at this point, in which the various sounds of skidding brakes include “I have forgotten so much,” or not being fluent enough, or in this case that “No one will understand”; but I persist that yes, this is the instruction, to please tell us a personal story in French. Romy is willing. This will be crucial. At every juncture, her willingness will be what allows us to move forward as she accepts the coaching . . . *trouver le chemin* (find the way), meeting each challenge to bring us to the extraordinary moment she will eventually create.

Once she has made friends with speaking aloud in French, we all agree that there is a release and an expressiveness from her when she is speaking this language in which she was first held, suckled, in which she first dreamt, that is not as fully there when she is speaking English. It is not unusual for law school students who are first generation immigrants, particularly when there has been a family saga of hardship and great sacrifice to be where the student now is, to burst into tears at this point in the exercise. Hearing their own voice in a law school classroom, speaking the language of their family-at-home, can be such a shock to the young attorney or law student that the years of impacted stress erupt in tears. Even for native English speakers, when third-year law students hear their own voice—its natural and personal cadences, inflections, placement—the voice they use in the hallway, now for the first time in the classroom speaking the legal arguments, the shock can be acute. They realize that for the three years they have been in these classrooms they have

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been buried alive, and such a profound mourning is released that they are suddenly ambushed by tears.

But Romy is affable, tackling each step of the exercise, so there are no tears. Now we add the next step: members of the group must translate, give back in English what they understand Romy is saying. And until they do, she does not have permission to move forward in the story. Again, there is some pro-forma confusion.

“But how can they understand what I’m saying? They don’t speak French.”

Someone from the group may call out, helpfully but with an edge, “Oh, I get it. *Charades*.”

I explain that they are free to call it whatever they want, but the instruction is that Romy must find a way for the group to understand what she is saying.

Within a few moments, all the attendees are leaning forward on their chairs. They are invested. *She* is invested. Gesture, facial expressiveness, purposeful movement, variations in the inflection and timbre of her voice are all joining her words because she does not have the option to keep going if the group does not understand. One of the key values of this exercise is it removes the assumption that merely saying the words fulfills the communication. She will try to compromise, of course, since it is deeply ingrained in us that the goal is to get to the end, but if too many words have gone by in French, and there has been no translating from the group members, I will stop her and she will need to go back. What is being established here is the interdependence between advocate and juror. A dialogue as opposed to a monologue. And everyone is surprised at how much they want to help her. They have a stake, because she is now communicating from the understanding that she *needs* them in order to go forward. We have all been trained to try to be the



first one across the finish line. But in the courtroom, if we get there first, and we get there alone, we have lost.

The group marvels at how much they *care*. Someone jokes that all Romy needs to do is always just speak French in court. But of course it is not the French. It is the focus and full-body commitment she is bringing to the communication. Once *that* motor is turning, she will be able to return to English with no loss of what is happening now in the room. But not quite yet.

The next step is only a refinement of what has already been accomplished, but an important one. She must still work only in French, but now, when the group gives her back in English what she is saying, what she is needing them to know, she must acknowledge their success. Express her appreciation. She will now need to say in French, “Yes. That’s right.” And then, “Thank you.” “Ah, oui, exactement. Merci.” This sounds easy enough, but it isn’t. Once the lawyer knows a juror has got it right, the lawyer wants to move on. To fulfill her agenda. Until the lawyer understands that empowering the juror *is* the agenda, the juror remains a necessary inconvenience. The “thank you” will be scurried over, tossed away, in the rush to get to the next piece of information the lawyer feels must be told. That “thank you” is the single most important part of the communication. It acknowledges that without the juror, the lawyer cannot finish the job. I have seen attorneys in front of a jury, when one of the jurors will audibly gasp or laugh in accord with what the lawyer has said, and the lawyer will purposefully ignore this expression of solidarity lest he be distracted from the recitation of his text. “Don’t get in my way by being on my side” is the unspoken communication. “I am more concerned about making sure I don’t forget anything than I am with you hearing what I am saying. If I engage with you, I risk losing my place.” The irony is that the advocate has just *found* his place, which is where that juror is. So here is where the

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advocate needs to commit as fully to the “thank you” as to the telling of the facts; he will do it once, but then just speed right past it. It becomes so obvious that this moment of honoring one’s partner feels demeaning, or like wasting time, or like pandering. Invariably, it becomes necessary to detain the advocate at this step of the halfhearted “thank you,” requiring that the advocate overdo the “merci”—a sweeping bow, for example—in order to overcome the resistance to connecting. When the lawyer, *finally*, capitulates and communicates the “thank you” with some behavior that he feels is completely “over the top,” the group cheers in delight at the victory over false pride.

But with Romy, there is an additional wrinkle with the “merci.” She is delivering it with a little curtsy and smile. The little dip and slightly singsong delivery of an automatic response, dissociated from the rest of her story. I have a friend who is a strong, independent American woman, a courageous attorney who attended school in France, and when she speaks French the persona of the French schoolgirl takes her over and this powerful individual disappears behind this same smile-and-dip. Romy is not present as herself when she utters the stock “merci.” Her authentic communication is halted by the punctuation of her “merci,” suspended as it would be by any reflexive gesture such as a salute, or making the sign of the cross, rather than it deepening her relationship with her listeners. For something so culturally ingrained, it is a testament to Romy’s openness and commitment how quickly she is able to dismantle this stock delivery. Soon enough we were in the presence, the embrace, of a masterful communicator, needing us, leading us, empowering us to participate by acknowledging, in each freshly expressed “Merci” what it means to her that she can trust us to carry forth her story. We are now part of her story, the story is now inextricable from our relationship with her. This dynamic in trial—accomplished without

requiring the actual speaking of the “thank you” or needing to stop the flow of communication to achieve it—allows the advocate to not merely be talking, but *entrusting* the pieces of the story to individual jurors, piece by piece, who will take it all back into the deliberation room and reassemble it there.

(There are variations on this exercise in which the participant, instead of speaking English, speaks gibberish. Or uses no language at all and has only the eloquence of body language to communicate. But because advocacy is “transmitted” primarily through the medium of spoken language, if it is removed entirely in the exercise, with all its internal structures of grammar and syntax, then reintroducing it at the end becomes an additional complication. Working in a foreign language not only maintains the element of speaking language throughout, but also keeps focus on how *all* lawyers have been trained in a non-native foreign lexicon, Legalese.)

David has seen this exercise many times, but what happens now he had not seen, and it is what happens now that is so thrilling. The story Romy chose to tell had to do with years before when her little sister had betrayed to their parents Romy’s secret of having a boyfriend. It “cost her nothing” to tell it. So I ask her to choose another story, one that has had some impact on her.

She begins to tell us—still in French, still with us giving back to her in English what we understand, still adjusting and clarifying until we do—how her parents would take the family back and forth between Haiti and the United States, and there came a time when her father was not well. He had diabetes, and he also was going to the hospital regularly for dialysis. One day, the technician is not there for the appointment. No one else has the key. They have to wait for someone to find the technician. Her father begins to look bad. Romy seems to be glossing over something, so

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I ask her to be specific. What are the visual specifics that make her father “look bad”?

We had already introduced the importance of specificity. Stanislavski, the father of modern acting, taught that “generality is the enemy of all art.” Chekhov, the father of modern playwriting, urged, “Don’t tell me the moon is shining; show me the glint of light on broken glass.” When we give jurors conclusions, we are shortchanging them of the essential nutrient of story. If we describe simply the physical details, what can be sensorially absorbed, the listener can *own* the story, and come to what feels like his own conclusion, which elicits a far more passionate attachment than a conclusion asserted by someone else. A someone else, in this case, who is an attorney with a case to sell.

Romy is describing how her father’s face is pale. How he needs to sit. She shows us how he falters, he begins to collapse . . .

Romy’s father dies.

The room stops in stunned silence. Romy is weeping. Several of the onlookers are frightened by what is happening. I get out of my seat and move to her. I stand with her, holding on to her elbows, close enough to support her if she needs it, but with enough distance that she can focus on me. I tell her, “I am right here with you.”

She looks directly at me and nods.

I wait for a few moments before speaking. “Can you tell me what is going on in you right now?”

“I’m fine.”

“Of course you’re not fine.”

She smiles.

I say, “But do you understand that for me, you have just hit gold? You are speaking to us from a place of loss. And love. Of what matters most to you.”

She nods.

“If you want to, you can certainly sit down. But we can also keep working.”

“Yes, I want to keep working.”

“Could your father come and visit us here?”

“How?” she asks.

I ask, “What is his name?”

“Morel.”

“Would you begin your opening again, and would you call your client Morel?”

The room is absolutely silent. Romy gathers herself, and all of us to her, simply with her eyes. Then, eventually, out of this silence, she begins to speak. Slowly.

“Morel lives alone. It is lonely there. So, at home he eats a little something, every day, and goes to Walmart.”

There is time as she is speaking for us to see him. She does not say one word about the kitchen, the door through which he left, but we *see* it. The faded, worn linoleum floor. The scarred wood.

“He walks up and down the aisles. The people. The things on the shelves. He sees things he would like. He knows he will never be able to afford to buy them, but that does not mean he doesn’t wish he could.”

This is where I begin to cry. When Romy first began her opening, she spoke of how it was a day like any other day. Nothing unusual or different. I knew we would have to talk about this. I understood what she was trying to do was defend against the assumption that her client was there to shoplift.

“He wasn’t doing anything.”

But this kind of generalizing never works. There is no such thing as “it’s just a regular day.” The day is always filled with some thought or purpose for the jurors, so if we’re told your client is aimless, pointed towards nothing, we either wonder

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what you are trying to hide, or categorize your client as somehow not like us.

Instead, without ever saying one word about “rewriting,” by bringing to her view of her client the love and respect she felt for her father, she endows the client with a dignity that allows her to walk with him directly into the face of the greatest suspicion against him: that he’d been observed looking at the merchandise, longingly, casing them out for theft. But in her tone it is so absolutely clear that yes, he *wants* the things, and no, he is absolutely not a person who would take them. We see him walking down the aisle. I still see him as I write this. We were walking with him. We saw the items through his eyes, and we accepted that we could not have them. They are there on the shelves, out of our reach, not for us.

She tells us Morel now needs to go home. As he moves to the first set of glass doors, behind which the Loss Prevention winged monkeys lie in wait for him, even the most flippant and edgy of her young colleagues begins to tense their bodies and tighten their jaws, leaning forward in their seats to intercept what is coming, to protect Romy’s client.

Did I actually hear one of them say, or did I just imagine it?

“If they *dare* lay one finger on him . . .”

## **COMMUNICATION EXERCISES IN THIS BOOK**

Throughout this book, we have interspersed David’s teachings with the exercises I have developed both for the lawyer and for preparing the witnesses. They are designed to be practiced live, in action, not simply read and their potential usefulness appreciated from the page. Trial, deposition, and juror deliberation are all live human events. Like any physical activity, they do not exist in the words that describe them. Neither the recipe nor the menu replaces the meal. The diver learns more about how to execute

the perfect swan dive from one belly flop than from a word-for-word perfect recitation of the *Red Cross Swimming and Water Safety Manual*. One must walk the talk.

I have had the experience over and over again of beginning to work with a trial lawyer on an opening, and the lawyer stands stiffly and intones even more stiffly:

A \_\_\_\_\_ may not needlessly harm a \_\_\_\_\_.  
And if he does, he is responsible for the harms and the losses . . .

Anyone familiar with David's work recognizes this script from the template of a David Ball opening. He will send you to that script in the coming pages. But the speaker I am hearing has not yet worked through the steps necessary to make these words his own. The lawyer wishes that he could just rub the magic lantern with this recitation and the genie will come out. And so our work becomes about what steps this lawyer needs to take so that when he speaks these words, they are *his*. This is the actor's work, to take the language the writer has provided, and flood it with enough personal experience that the lawyer seems to be discovering this language, newly and personally minted in this moment, in this unique conjunction of what the lawyer came to say, and to whom he is saying it. The jurors need to be in the presence of a *person*, not a *lawyer*. A person speaking to people, in live human relationship to these other people.

The exercises in this book explore how to effectively resolve the tension between the actor's work and the writer's work, which is inherent in the trial lawyer's work. Law school, for the most part, trains the writer in analysis, teaching which words are needed to be in accordance with the law. The first year of law school is so torturous for many because what is scoured out of the student is the instinct that how the student *feels* about the

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issue has any relevance. But in the live human event of the courtroom, the jurors—as well as the judge, who is, beneath the robe and the jurisprudence, human—need to be moved to take an action. This requires a different order of human experience than the analysis taught in and rewarded in law school. No matter how rational and *logical* we believe our decision-making process to be, neuroscience has revealed that all decision-making has an emotional spark at its formation. We line up *the facts* to support our position, not the other way around. The human quotient in the courtroom is not optional.

David and I came from the world of the theater, where we understood the distinctions and tensions and interdependence between the writer's work and the actor's work. It is what allowed us to be of use to the trial lawyer, one of the few occupations where the speaker writes his own script. And add to these the director's work, because the advocate is additionally responsible for facilitating the live human event of the trial, to direct the attention of the jurors or judge to what they must see and hear to take the appropriate action.

David and I began our work together on this book with several days of speaking of just this:

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JOSHUA: I was working last week with a group of lawyers, all idealistic, highly motivated, and what they wanted to work on was connecting to the jurors. First, it was necessary that they had to be very clear on the story they were going to tell, so they weren't worried about what to say next, about creating a script. We went through it, and distilled it down to four or five minutes of a very tight text, everything moving forward, present tense, simple actions that could be seen, smelled, heard, tasted, and touched. But then they got up to deliver it, and it turned into slop. The speaker began to wander and detour through it, go



off on tangents, start arguing, and I had to stop him and have him start over again. They got a little impatient because they wanted to focus on connecting with the listeners. But if they don't clearly know the story they are asking the listeners to be responsible for bringing to its just conclusion, they become distracted from the connecting. They start talking to themselves, working out the script. They start arguing because they get anxious that the story isn't persuasive enough. You can't be doing the writer's work while you're trying to do the actor's work.

DAVID: An actor has the advantage of somebody else having done that work for him. "Here's the words you are going to say."

JOSHUA: Right.

DAVID: So the actor can memorize and then get on with the work.

JOSHUA: Exactly. Which is why, having come from the background that you and I did, we were somewhat well-fitted to bring something of value to the trial lawyer, because we knew the different disciplines.

DAVID: But now, how does a lawyer reconcile the two priorities?

JOSHUA: By accepting, expecting, valuing the variables of this moment, this live moment, and who is there, who you must connect to if they are going to be truly receiving what you're saying.

DAVID: At a minimum, it's now a part of the story. If you watch a really good storyteller, a really experienced storyteller, the audience is always a part of the story. Somebody says something; he picks it up and uses it and goes on.

JOSHUA: Folds it in. There is a wonderful teacher/director/actress, Joan Darling, who said that great acting, as in life, is often the

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result of who you are talking to suddenly becoming more real to you than what you'd come onstage intending to say.

DAVID: Well, and it's something that is useful for lawyers which was certainly important for actors, which is that the most important person on the stage is the one you are talking to. Not you. Ever.

JOSHUA: David Ball has said—I have this written down—theater informs trial in three ways: one, it is a live human event; two, the participation of every individual who is present is vital or they should not be there; and three, that it's always about the other person, it is never about you.

DAVID: I said that? I don't remember.

JOSHUA: That's why I wrote it down!

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This book writes it down: How to tell a story that helps guide the jurors to the right and necessary decision. What is involved in telling—the voice, eye contact, story structure. What is involved in connection with jurors—the human interaction of a conversation, even when only the lawyer is speaking. What is involved in empowering the listeners to take responsibility for righting a wrong. Taking what we knew and practiced in the theater, and have for thirty years been putting at the disposal of those who seek to make a better world through the role of the lawyer both in and out of courtrooms, which someone once called “the theater of the real.”

# 1

## CURTAIN RAISER

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*Trouble is, nobody listens. When nobody listens, it's all a crapshoot.*

—David Ball to theater students, annually, 1978–1990

### DAVID BALL

Nothing is worse than jurors not paying attention, says my partner Artemis Malekpour. The average juror's attention rate starts near 100 percent and drops to under 25 percent well before the end of day one. Some lawyers and certain cases get a little higher rate. So this chapter shows you how to maintain juror attention.

Without juror attention, all else is wasted. Yet walk into any trial at any random time and you'll almost always see inattentive jurors, often the whole jury. Later, ask the lawyer if she had juror attention. She'll say yes. But she hardly ever looked at them, so how would she know? If she did look, the jurors snapped to wide-eyed pretend attention. Jurors can plaster on that faux-attention look for hours; they learned it in second grade. But at any random moment ask an attentive-looking juror what was just said. Odds are high she won't know.

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BALL

Why does this happen? What can you do about it?

When jurors don't immediately see how something directly helps their decision-making, they ignore it and stop listening. That breeds boredom; boredom breeds resentment.

### PLACATE ATHENA!

Athena, Greek goddess of justice, gave you the burden of achieving 100 percent juror attention. So you better achieve it because Athena is also the goddess of weapons, not to mention verdicts.

Compounding the problem of juror attentiveness, the fraction each juror hears is randomly different from every other juror's fraction. There's no predicting outcome when you put all this juror randomness together. Random raised to the sixth or twelfth power equals crapshoot.

But you can boost attention rate to 75 percent, even near 100 percent.

To show our simple skill,  
That is the true beginning.

—Peter Quince, playwright in  
*A Midsummer Night's Dream*

In theater and film, our simple skill—our lifeline—is **attention vigilance**. If we're good, we apply it at every moment. Otherwise people say, "Damn show looked like a lawyer directed it." Lawyers don't use—have probably never heard of—our simple skill of attention vigilance. So the same people who pay to get into theater and movies would pay to get out of juries.

An inattentive jury is your own fault. You must work moment by individual moment to engage juror attention; engagement is never automatic.

Engage me or you're dead.

—A girl at David Ball's tenth grade  
Sadie Hawkins dance, NYC, 1959

## THE LINK TO ENGAGING ATTENTION

Start with this: from the juror's point of view, each moment is attention-worthy only if the juror knows—at that specific moment, not later—why she needs it. When she doesn't know, the moment is useless to her. So she doesn't listen, so it's useless to you, too. Jurors often go hours or days without knowing why they need what's going on in front of them. This is your fault, and they stop listening.

The link between content and why she needs it is the most important—and most ignored—requirement of jury communication. Few lawyers have heard of that link, much less paid attention to it.

## ATTENTION VIGILANCE

First, you must know why the jurors need what you're saying or eliciting at each particular instant in trial. No generalizing. Know the juror-purpose of every moment. If you can't figure out why something is directly important to juror decision-making, it's not. Omit it. (For more information about juror decision-making, see page 51, "Create an Inclusion List.")

Second, as the moment occurs, make sure the jurors know why they need it. Sometimes it's obvious. Often not.

If you yell at your family to leap out their second-story bedroom windows in the middle of the night they'll think you're crazy—until you tell them there's a fire on the first floor. That's the link: "Why do I need the content?"

To forge the link:

- ◆ **Limit:** Make sure what you present is directly relevant to a decision jurors must make. "Background information" is never relevant. It interferes with relevance.
- ◆ **Label:** Tell jurors why it's important. "Mr. Jones, please describe the intersection *so we'll know where the bus came from.*" (The italics are the label.) Label everything unless its importance is automatically clear. When you're not sure, label it.

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BALL**

- ◆ **Remind:** After each critical point, remind jurors—unless it's obvious—why they need it. “Thanks for describing *where the bus came from.*”

Do that for everything you say and elicit, and remind them when you bring it up again. That can double juror attentiveness.

Then pay attention to page 50, “TMI (Too Much Information) and Its Equally Rotten Twin TMW (Too Many Words)” and you'll increase attentiveness. Then keep your trial short and you'll increase it even more.

Even if you stop reading this book now and master only what you've read so far, the quality of your advocacy will soar.